

fully occupied since it is an agricultural land planted with rubber and used by the respondent company for rubber tapping with exclusive possession. As such, it is not a vacant land. Even if all the lots are taken together and considered jointly as an estate, this would not change the position. Still the whole estate is a fully occupied estate and not vacant. Therefore the proviso (c)(i) does not apply, and the rates should be fixed on the basis of the estimated annual rent in accordance with the definition of "annual value".

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; Shearn Delamore & Co.*

**LESCO DEVELOPMENT CORP. SDN. BHD. v.
MALAYSIA BUILDING SOCIETY BHD.**

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) 1 April & 9 September 1987]

[Kuala Lumpur – Supreme Court Civil Appeal
No. 417 of 1986]

Civil Procedure – Order of sale made in foreclosure proceedings – Appeal against – Default judgment given in another court in claim against borrower and guarantors on loan – Land charged to secure loan.

The appellant had charged its land to the respondent to secure a loan of \$5m. There was a document of guarantee signed by the guarantors. The respondent claimed the sum owing and unpaid from the appellant and the guarantors. The respondent also initiated foreclosure proceedings in respect of the charge. The respondent obtained judgment in default of appearance in its suit for the recovery of the loan but the appellants applied to have this set aside. The application was still pending. The respondent's application for foreclosure was heard in another court and an order of sale was granted. The appellant appealed against the order of sale.

Held: (1) it is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter;

(2) in this case the hearing of the foreclosure proceedings should have been postponed until the final disposal of the claim on the debt;

(3) the order of sale should be set aside and the hearing of the foreclosure application be dealt after final disposal of the claim on the debt.

A SUPREME COURT.

G. Krishnan for the appellant.

Miss Grace Lim for the respondent.

Cur. Adv. Vult.

B Wan Hamzah S.C.J. (delivering the judgment of the court): In December 1981 the appellant, Lesco Development Corporation Sdn. Bhd. (hereinafter referred to as Lesco), charged its land to the respondent, Malaysia Building Society Bhd. (hereinafter referred to as MBS), on the terms and conditions contained in an agreement attached to the document of charge as an annexure to secure a loan of \$5,000,000 which MBS had agreed to grant to Lesco. A document dated November 30, 1981 which was purported to be a document of guarantee in respect of the loan was signed by five persons (hereinafter referred to as the guarantors).

On December 13, 1985, MBS filed a suit in the Commercial Division of the High Court at Kuala Lumpur (Civil Suit C8369/1985) against Lesco and the five guarantors, in which it is alleged that Lesco owed MBS a sum of \$4,688,863.70 as at October 31, 1985, in breach of the terms and conditions of the charge. MBS claims that sum from Lesco and the guarantors. A few days later, *i.e.* on December 17, 1985, MBS filed in the Family and Property Division of the High Court at Kuala Lumpur an originating summons (Originating Summons F2652/1985) to initiate foreclosure proceedings against Lesco in respect of the same charge.

G On January 31, 1986, MBS obtained judgment in default of appearance against Lesco in Civil Suit C8369/1985. On April 15, 1986, Lesco filed summons-in-chambers asking for an order to set aside the default judgment and took steps to show that it has a good defence. In this regard it is alleged by Lesco, *inter alia*, as follows:

- H** (a) MBS had breached the agreement (particulars of the breach are stated).
(b) By letter dated July 13, 1985, MBS had terminated the agreement.
(c) MBS has not released the loan of \$5,000,000 in full, and under the terms of the agreement MBS can recover the loan only after it has released the loan in full.
I (d) MBS's claim for compound interest is in contravention of section 11 of the Civil Law Act.

The application to set aside the default judgment is still pending in the Commercial Division. In opposing the foreclosure proceedings Lesco raised the

same issues as stated in (a) to (d) above. Lesco also contended that the notice of default in Form 16D issued by MBS was defective and invalid for the reasons stated in the affidavit in opposition. The fact that the MBS had obtained the default judgment was disclosed by Lesco in its affidavit. On September 19, 1986, the originating summons came up for hearing before Siti Norma Yaakob J. and after hearing submissions of counsel for the respective parties she decided on all the issues and granted an order of sale. The present appeal before the Supreme Court is brought against that order.

It is undesirable to allow a situation where two different courts would try and determine the same issues arising between the same parties relating to the same subject matter. As MBS had chosen to sue Lesco in the Commercial Division before filing the originating summons and there was already default judgment in the suit and the application to set aside the default judgment is still pending, in our opinion the hearing of the originating summons should have been postponed until final disposal of the suit in the Commercial Division. Therefore we order that the order of sale be set aside. We further order that the originating summons be dealt with after the final disposal of the suit, and that appropriate orders should be made on the originating summons taking into consideration the result of the suit.

The appeal is allowed with costs here and in the court below. The deposit should be refunded to Lesco (appellant).

Appeal allowed.

Solicitors: *Krishnan & Co.; Rashid & Lee.*

**ISMAIL BIN MOHAMAD v. HAJI YAHYA
& 8 ORS.**

ISMAIL BIN MOHAMAD v. MAYAH & 2 ORS.

[O.C.J. (L.C. Vohrah J.) 17 December 1987]

[Kuala Lumpur -- Civil Suit Nos. F 313 & 315 of 1983]

Land Law – Sale and purchase agreement – Private caveat to protect purchaser's interest – Registration of transfer despite caveat – Whether Collector in error – Whether registration of transfer conferred indefeasibility – Priority between two competing parties – National Land Code 1965, ss. 322, 340 & 418.

Contract – Construction of agreement – Contra proferentum rule.

A In these two consolidated suits, the plaintiff (Ismail bin Mohamad) seeks a declaration that he is the beneficial owner of $\frac{1}{4}$ undivided share in a piece of land held under EMR 6130 for Lot 652, Mukim of Setapak, Daerah Wilayah Persekutuan, measuring 1 acre 0 rood 0.75 pole ("the said interest") and that in Civil Suit No. F 315 of 1983 the registration of the transfer by the three defendants (the three sisters Mayah, Siti and Rafeah) of their respective shares as beneficiaries of the estate of Undang bin Mangkuta to the nine defendants in Civil Suit No. F 313 of 1983 be cancelled.

B In Civil Suit No. F 315 of 1983, the plaintiff also seeks specific performance and damages for breach of contract against the three defendants pursuant to the sale and purchase agreement which he had entered into with them.

C The three ladies sold their respective shares in the said interest to the plaintiff for valuable consideration.

D On 23 November 1982, the plaintiff entered a private caveat against the said interest. On 18 April 1983, the respective shares of the three ladies were registered in favour of the nine defendants.

E The five questions for determination are: (a) Is there a subsisting sale and purchase agreement between Ismail and Mayah, Siti and Rafeah? (b) Was the private caveat lodged by Ismail capable of binding the said interest in the light of its being registered specifically in the name of Undang bin Mangkuta (deceased) when at the material time the said interest had been extinguished by virtue of the transmission of the deceased's estate to the three ladies? (c) Was there a mistake made by the Collector of Land Revenue when he registered the transfer effected by the three ladies in the light of the private caveat? (d) Can the indefeasibility of title conferred upon registration be set aside in the event of the mistake made by the Collector of Land? (e) In the event that the registration is wrong and can be set aside on the ground of mistake, which of the two competing parties has priority?

F **Held:** (1) the answer to (a) is in the affirmative; (2) on (b), the caveat bound the said interest; (3) the Assistant Collector was in error when he registered the transfer on 18 April 1983 in the face of the subsisting caveat; (4) the answer to (d) is in the negative; (5) (e) calls for no consideration; (6) the declaration is granted that the plaintiff is not the beneficial owner of the said interest; (7) the learned judge found that the three ladies were liable to the plaintiff for breach of contract and damages which are to be assessed;

G (8) in respect of Civil Suit No. F 313 of 1983, each party was to bear his/their own costs. In respect of Civil Suit No. F 315 of 1983, the costs were awarded against the three ladies. The injunction originally granted to the nine defendants was discharged.

Cases referred to:

(1) *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 M.L.J. 212 (refd).